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No. 87-1706

In the Supreme Court of the United States

OCTOBER TERM, 1987

FLORETTA DUKES MCKENZIE, SUPERINTENDENT OF SCHOOLS, ET AL., PETITIONERS

v.

JUANITA M. JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in the absence of particularized suspicion, a public employer is prohibited under the Fourth Amendment from administering a drug test to employees, on the ground that the test cannot accurately determine whether the employee was under the influence of drugs while on duty.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Discussion	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

AFGE v. *Dole*, 670 F. Supp. 445 (D.D.C. 1987), appeal docketed, No. 87-5117 (D.C. Cir. Dec. 11, 1987)	9
Black v. *Cutter Labs*, 351 U.S. 292 (1956)	7
California v. *Rooney*, No. 85-1835 (June 23, 1987)	7, 8, 9
Electrical Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241 (1939)	8
National Fed'n of Fed. Employees v. *Carlucci*, No. 86-0681 (D.D.C. Mar. 1, 1988), appeal docketed, No. 88-5080 (D.C. Cir. Mar. 16, 1988)	9

Constitution, statute and regulation:

U.S. Const. Amend. IV	1, 4, 6
Act of July 11, 1987, Pub. L. No. 100-71, § 503, 101 Stat. 468-471	1
Exec. Order No. 12,564, 3 C.F.R. 224 (1987)	1

Miscellaneous:

53 Fed. Reg. 11970 (1988)	2
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	8

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INTEREST OF THE UNITED STATES

The question presented in this case is whether, under the Fourth Amendment, a public employer may administer a drug test to its employees, in the absence of particularized suspicion of drug use, where the test is incapable of determining whether or not an employee was under the influence of drugs while on duty. The United States has a compelling interest in the disposition of that question. As a general matter, pursuant to Exec. Order No. 12,564, 3 C.F.R. 224 (1987), all federal agencies are required to establish programs for the drug testing of employees in sensitive positions. Congress has also enacted legislation establishing additional requirements for federal drug-testing programs (Act of July 11, 1987, Pub. L. No. 100-71, § 503, 101 Stat. 468-471) and, in compliance

therewith, HHS has recently issued Guidelines establishing procedures for federal employee drug testing. 53 Fed. Reg. 11970 (1988). More specifically, the United States has petitioned for a writ of certiorari in *Burnley* v. *Railway Labor Executives' Ass'n*, No. 87-1555, a case raising issues substantially similar to the present one. Because of its interest in the issue, the United States filed a brief in this case in the court of appeals in support of petitioners. For the reasons stated below, however, we believe that the *Burnley* case is a more appropriate vehicle than the present case for the resolution of the question presented in the petition.

STATEMENT

1. In 1977, the Superintendent of the District of Columbia Schools issued Directive 662.13, which states in pertinent part (Pet. App. 15a):

> [I]t is strictly prohibited for school personnel * * * to possess, use or be under the influence * * * of * * * narcotics, * * * or other drugs such as LSD, marijuana and the like, while on school premises. Personnel found violating this directive will be subject to suspension and/or termination.

In the summer of 1984, the District of Columbia School System initiated a program of urinalysis testing for the detection of illegal drugs, and the System's Transportation Division implemented that program by requiring over 200 Transportation Division employees to take physical examinations that included urinalysis testing for drugs. The Division initiated the program after discerning a significant increase in traffic accidents and absenteeism and discovering syringes and bloody needles in restrooms frequented by Transportation Division employees. In a directive issued on June 12, 1984, the Superintendent advised that "[t]he confirmed finding of an illicit narcotic sub-

stance in the urine of an employee * * * shall be grounds for termination of that employee." Pet. App. 15a, 17a.

To test the urine samples, the Transportation Division used the EMIT Cannabinoid Urine Assay, a test that detects the presence of metabolites of the psychoactive chemical THC, which produces the intoxicating effect associated with marijuana and hashish. The EMIT test does not indicate, however, when the ingredient was absorbed, in that THC metabolites may be retained in an individual's system for days or even weeks. Pet. App. 17a.

2. Respondent was hired by the Transportation Division in 1981 as a school bus attendant. In that capacity, she was responsible for assisting handicapped children on and off the bus. In some cases, this required physically carrying the child. Respondent was also responsible for ensuring that the children were properly seated and orderly during the sometimes lengthy bus trips. Pet. App. 5a.

Together with other Transportation Division employees, respondent underwent a physical examination and urine test in the summer of 1984. Her test was positive for THC metabolites, indicating marijuana use. Upon learning of respondent's test result, petitioners terminated her employment. Pet. App. 5a-6a.

3. Respondent thereafter commenced this action in the United States District Court for the District of Columbia. On February 24, 1986, the district court granted summary judgment in respondent's favor (Pet. App. 14a-29a). The court first held (*id.* at 19a-25a) that respondent had a protectible property interest in her job and a liberty interest in her reputation, and that terminating her employment on the basis of a single unconfirmed EMIT test was arbitrary and capricious. The court next found (*id.* at 25a-26a) that petitioners had violated respondent's procedural due process rights by discharging her without first affording her "some adversary process * * * in order to determine that

(1) she is, in fact, the subject of the particular positive test, and (2) that the positive test has been appropriately confirmed." Finally, the court held (*id.* at 26a-29a) that, under the Fourth Amendment, petitioners were prohibited from administering any drug test to respondent in the absence of individualized suspicion of drug use. In so holding, the court acknowledged (*id.* at 28a) that "[s]chool bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be subject to urine and blood tests not required of other bus drivers without particularized suspicion." The court held, however, that "it does not follow that a school bus *attendant* like [respondent] should have expected to be exposed to such testing or that public safety considerations require testing of a school bus attendant like [respondent] * * * in the absence of particularized probable cause" (*id.* at 28a-29a (emphasis in original)).

4. Petitioners appealed only the district court's holding that the Fourth Amendment flatly prohibits drug testing of bus attendants in the absence of "particularized probable cause" (Pet. App. 6a-7a). On November 17, 1987, the court of appeals reversed and vacated "that portion of [the district court's] injunction from which appeal was taken" (*id.* at 13a). The court first found (*id.* at 7a-8a) that mandatory urinalysis of public employees is a "search" within the meaning of the Fourth Amendment. Turning next to the question whether the search was "reasonable," the court took pains "to make clear the narrow focus of [its] inquiry" (*id.* at 8a-9a). In particular, the court noted (*id.* at 9a (emphasis in original)), "[t]he only issue in this case is the propriety of the District Court's blanket injunction prohibiting *any* drug testing in the absence of probable cause." The court explained (*ibid.*) that the case did not present the question whether drug testing outside the context of "a regular medical examina-

tion" would be constitutional. The court then observed that, because "the EMIT test is not a valid measure of whether the subject is in possession of, is using, or is under the influence of illicit drugs at the time of the test," the test "lacks a sufficient nexus to the [petitioners'] legitimate concern that * * * employees not possess, use or be under the influence of drugs while on duty" and therefore may not be constitutionally administered (*ibid.*). Finally, on the merits the court held (*id.* at 10a-12a) that while "strong privacy interests are involved here" (*id.* at 10a), the "*serious* safety concerns on the other side of the balance" (*ibid.* (emphasis in original)) justify the use of some drug tests for bus attendants, "as a part of routine employment-related medical examinations" (*id.* at 11a (footnote omitted)), in the absence of particularized suspicion.[1]

DISCUSSION

Although petitioners were the prevailing party in the court below, they ask this Court to review the remark in the court of appeals' opinion stating (Pet. App. 9a) that respondent could not constitutionally be tested in the manner she was tested because there was an insufficient nexus between the EMIT test and petitioners' interest in assuring that public employees are not impaired while on duty. Petitioners contend that, in light of this statement by the

[1] In reaching that conclusion, the court emphasized (Pet. App. 12a) that petitioners' policy of administering the test during a routine physical examination "ensur[ed] that the intrusion on the employee's privacy is minimized." Moreover, the court reiterated (*ibid.*) that "any drug test the School System employs in the future must be one that validly detects the activity with which the School System is legitimately concerned"—in this case, the "concern that employees involved in the transportation of handicapped children not be under the influence of drugs while on duty."

court of appeals, public employers will be unable to use drug tests "to deter or prevent on-the-job drug use or impairment" (Pet. 7). We share petitioners' concern that the court of appeals' opinion might be read to cast doubt on the use of drug tests that do not conclusively establish impairment while on duty; and we agree with petitioners that deterrence of on-the-job drug use is a compelling justification for drug testing. For three reasons, however, we believe that this case is an inappropriate vehicle for resolving those questions. First, as the prevailing party below, petitioners are not entitled to seek this Court's review of the judgment. Second and related, because the offending language in the court's decision is dictum, it may well be repudiated by a subsequent panel of the court of appeals. It is also possible that a future panel may read the court of appeals' opinion narrowly—as suggesting simply that when the sole stated purpose of drug testing is to determine impairment on duty, the test employed must accurately measure on-the-job impairment. Finally, this Court may well have an opportunity to consider the same issues in *Burnley* v. *Railway Labor Executives' Ass'n,* No. 87-1555, in which the government's petition for a writ of certiorari is currently pending. Accordingly, further review of the present case is unwarranted.

1. The district court enjoined petitioners from using any drug test for bus attendants, in the absence of "particularized probable cause" (Pet. App. 29a). It was from that judgment, and only from that judgment, that petitioners appealed (*id.* at 6a-7a). Agreeing with petitioners, the court of appeals held that the Fourth Amendment permits public employers to test bus attendants for drug use, at least where the test is capable of measuring present impairment and is administered during a routine physical examination (*id.* at 12a-13a). The court of appeals therefore reversed the judgment of the district court and "vacate[d]

that portion of its injunction from which appeal was taken" (*id.* at 13a).

To be sure, petitioners are justifiably troubled by the language in the court of appeals' opinion that appears to limit the kinds of drug tests that may be employed and the purposes for which they may be administered. But as this Court recently explained in *California* v. *Rooney,* No. 85-1835 (June 23, 1987) (per curiam), the Court " 'reviews judgments, not statements in opinions' " (slip op. 3, quoting *Black* v. *Cutter Labs.,* 351 U.S. 292, 297 (1956)). In the *Rooney* case, for example, the defendant moved to quash a search warrant, alleging that there was insufficient evidence of probable cause. He contended, in particular, that the police had unlawfully seized evidence from his trash bin and that the evidence seized could not be used to support the search warrant. The trial court granted the motion to quash on that ground, but the Court of Appeal reversed. Although it agreed with the defendant that the evidence seized from the trash could not be used to support the warrant, it found that the other evidence was sufficient to establish probable cause. The State then sought review in this Court, arguing that the lower courts had erred in finding the search of the trash bin to be unconstitutional. This Court granted review but thereafter dismissed the writ of certiorari as improvidently granted. The Court explained (slip op. 3) that "the judgment of the Court of Appeal was entirely in the State's favor—the search warrant which was the sole focus of the litigation was deemed valid." Moreover, the Court noted (*ibid.*), "[t]he fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing party to request [the Court] to review it." The Court acknowledged that the state court's analysis "may have been adverse to

the State's long-term interests" (*id.* at 4). But it held that that fact "does not allow the State to claim status as a losing party for purposes of this Court's review" (*ibid.* (footnote omitted)). Accord R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 46 (6th ed. 1986) (footnote omitted) ("while some winning parties have attempted to petition for certiorari, there appears to be no recorded instance where the Court has * * * granted a petition filed by a party who prevailed on the merits in the court of appeals").[2]

In the present case, as in *Rooney,* the judgment of the court of appeals was entirely in petitioners' favor: they sought to vacate that portion of the district court's decision enjoining the use of any and all drug tests for bus attendants in the absence of probable cause; and the court of appeals, holding for petitioners, vacated the judgment as requested. To be sure, as in *Rooney,* the opinion of the court of appeals contains language that may be "adverse to the [petitioners'] long-term interests" (*Rooney,* slip op. 4).

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[2] Petitioners' reliance (Pet. 6) on *Electrical Fittings Corp.* v. *Thomas & Betts Co.,* 307 U.S. 241 (1939), is misplaced. In that case, the trial court held that although respondent's patent was valid, petitioner had not infringed it. Petitioner was therefore the prevailing party, but he nevertheless sought review in this Court. This Court, entertaining the petition, reversed the judgment insofar as it had upheld the validity of the patent. The Court acknowledged (*id.* at 242 (footnote omitted)) the general rule that "[a] party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." But because the decree purported to resolve the validity of the patent, and because the district court had "adjudicat[ed] * * * one of the issues litigated" by the parties, the Court elected to consider the petition in order "to direct the reformation of the decree" (*ibid.*). In the present case, by contrast, the disputed language constitutes unwarranted dictum, by no means necessary to the disposition of the case. In any event, the current vitality of the *Electrical Fittings* case is in some doubt following the Court's decision in *California* v. *Rooney, supra.*

But as the Court made clear, that fact simply "does not allow [petitioners] to claim status as a losing party for purposes of this Court's review" (*ibid.* (footnote omitted)).

2. Because the disputed language in the court of appeals' decision is unnecessary to the actual disposition, it is entirely possible that a subsequent panel of the court of appeals will reach a different result in a case that squarely presents the issue. Indeed, the court of appeals now has before it two cases that may well afford that court an opportunity to reconsider the remarks of the panel in the present case. See *AFGE* v. *Dole,* 670 F. Supp. 445 (D.D.C. 1987), appeal docketed, No. 87-5117 (D.C. Cir. Dec. 11, 1987) (drug testing of civilian employees of the Department of Transportation, including air traffic controllers); *National Fed'n of Fed. Employees* v. *Carlucci,* No. 86-0681 (D.D.C. Mar. 1, 1988), appeal docketed, No. 88-5080 (D.C. Cir. Mar. 16, 1988) (drug testing of civilian employees of the Department of Defense, including air traffic controllers, pilots, and aircraft mechanics). "Giving [the court of appeals] an opportunity to consider the issue in a case that properly raises it is a compelling reason for [the Court] to dismiss this petition" (*Rooney,* slip op. 6 (footnote omitted)).

Moreover, the statements in the court of appeals' opinion challenged by petitioners are ambiguous. They could mean, as petitioners suggest, that the only legitimate purpose of employee drug testing is to measure impairment while on duty, and that the tests employed must therefore accurately determine on-the-job impairment. But the statements could also mean that when a public employer has advanced as its sole purpose the detection of on-the-job impairment—and has advanced no other purpose—the tests used must be able to measure present impairment. A future panel in the District of Columbia Circuit may

well choose the latter, narrower reading of the court of appeals' decision and therefore, in an appropriate case, approve a drug test that is incapable of accurately determining current impairment. The fact that the challenged statements are not only dictum but are also ambiguous further militates against review in this case.

3. Finally, we believe that this Court presently has before it a case that may well afford it the opportunity to address the issues raised by petitioners. In *Burnley* v. *Railway Labor Executives' Ass'n,* No. 87-1555, in which the government's petition for a writ of certiorari is now pending, the Ninth Circuit held that the Fourth Amendment prohibits blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents. Like the court below, the Ninth Circuit objected to urinalysis testing—at least, without a supplemental blood test—in part because it is incapable of discerning on-the-job drug impairment. We believe that there are convincing answers to that objection and that the *Burnley* case is an appropriate vehicle for stating them.[3]

4. The other reasons suggested by petitioners for review in this case are unpersuasive. While it is true that safety concerns are not the primary justification for the drug testing program in *National Treasury Employees Union* v. *von Raab,* No. 86-1879 (Pet. 7-8), they are the centerpiece of the testing program in *Burnley.* For the reasons stated above, we believe that *Burnley* is a more

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[3] The Court also has before it another case raising the issue of employee drug testing in the absence of particularized suspicion. *National Treasury Employees Union* v. *von Raab,* No. 86-1879. That case, however, does not clearly present the question of the inability of drug tests to discern on-the-job impairment, since the Customs Service implemented a urinalysis program to determine whether its employees in sensitive positions have used narcotics at any time, whether on the job or otherwise.

appropriate vehicle for addressing those concerns. Moreover, petitioners err when they suggest (Pet. 8) that the circuits are divided on the question whether employers may conduct drug tests in order to deter illicit drug use; neither the Ninth Circuit in *Burnley,* nor the court of appeals in this case, held, as petitioners contend (Pet. 8), "that urine drug tests may only be used to detect whether incidents that have already occurred were caused by drug impairment." [4] Finally, there is no reason to hold the petition in this case for disposition in light of *von Raab* (Pet. 17); petitioners have already prevailed in the court of appeals, and the court below is unlikely to make changes in the language of its opinion to accommodate the decision of this Court in *von Raab.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The court below identified as a "legitimate justification for the drug testing program" the School System's concern "that employees involved in the transportation of handicapped children not be under the influence of drugs while on duty" (Pet. App. 12a). But the court did not state, as petitioners surmise, that this is the only legitimate justification for a drug testing program.

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